

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

ALBERTSON'S, INC.

Employer

and

Case 19-UC-658

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 381, affiliated with
UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record¹ in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Union is a labor organization within the meaning of the Act.

The Employer operates numerous grocery stores in several counties in the state of Washington, including its store in Kingston, Washington, involved herein. The Kingston store (herein, "the Store") opened in January 1998. It is considered a "superstore," and comprises about 40,000 square feet. Petitioner represents certain employees in the store in two multi-employer bargaining units: grocery employees and snack bar/takeout food/salad bar/deli department employees (herein, "deli unit"). In addition, meat department employees and production bakers are represented in separate units under a different collective bargaining agreement. There are also two groups of unrepresented employees in the store: pharmacy employees and courtesy booth employees.

In late October 1998, the Employer opened a coffee bar in the store. Petitioner seeks accretion of the coffee bar employees to the deli unit; the Employer opposes accretion, but has stated its willingness to

¹ The parties filed briefs, which have been considered.

recognize Petitioner as the collective bargaining representative of the coffee bar employees, in the deli unit, on the basis of a card check.

The relevant collective bargaining agreement is between Petitioner and Allied Stores, Inc., and is entitled the Grocery/Bakery/Deli (Kitsap/North Mason)² agreement (“the Agreement”). The Agreement was signed on August 31, 1998, and has a term of May 3, 1998 to May 6, 2001. The deli unit is covered by an addendum to the Agreement (Addendum Agreement Snack Bar, Take-out Food, Salad Bar, and Deli Department), (“Addendum”) in which there appears the following recognition clause:

Allied Employers, Inc., hereby recognizes during the term of this Agreement, United Food and Commercial Workers Union Local No. 381, chartered by United Food and Commercial Workers International Union, AFL-CIO, CLC, as the sole and exclusive collective bargaining agency for a unit consisting of all Snack Bar, Take-Out Food, and Deli Department employees employed by it in its present and future Kitsap/North Mason Counties, Washington Retail Food Stores with respect to rates of pay, hours, and other conditions of employment, except and excluding the Department Manager, Store Director, Grocery and Produce Department employees, Bakery Sales Department employees, Bakery Production Department employees, Meat Department employees, janitors, professional employees, confidential employees, office clerical employees, guards, watchmen, and supervisors, as defined in the National Labor Relations Act, as amended.

The coffee bar is a recent concept in grocery store merchandising. The Employer has two other stores, Port Orchard and Poulsbo, covered by the same collective bargaining agreement as the Kingston store; neither of those stores has a coffee bar. With respect to other employers covered by the same collective bargaining agreement, it appears that only the QFC store in Oyster Bay has a coffee bar analogous to that operated by the Employer. The QFC coffee bar is adjacent to the bakery, and the coffee employees are paid in accordance with the bakery sales wage classifications in Appendix B of the contract. The Safeway stores on Callow Avenue in Bremerton and in East Bremerton sell espresso in the deli departments, along with various prepared hot foods and cold, sliced meats and cheeses, and the employees who prepare and sell the coffee drinks are clearly deli employees.

The Store’s coffee bar is located next to the front entrance to the Store. The deli department is at the back of the store, approximately 90 to 100 feet from the coffee bar. The intervening area is occupied by typical grocery aisles. Prior to the opening of the coffee bar, a table with ordinary self-serve coffee was set up near the entrance to the store. At that time the coffee was prepared in the bakery.

The coffee bar sells specialty coffee drinks such as espressos and lattes; milkshakes; ice cream; iced coffee drinks; chocolates; chocolate covered espresso beans; Otis Spunkmeyer muffins; biscotti; mugs, tee shirts, hats, and other Seattle’s Best Coffee souvenirs; gift packs of coffee; and gift baskets for special occasions. Coffee bar employees use an espresso machine, blender, coffee pots, and associated utensils in performing their work. They also operate a cash register. There are chairs and a table in front of the coffee bar where customers may sit.

The deli department sells fried and roasted chicken, prepared salads, sliced meats and cheeses, pizzas, sandwiches, and packaged meals. They use a chicken fryer, oven, slicers, and associated cooking utensils in performing their work. They do not operate a cash register. There is no customer seating area near the deli department.

² That is, Kitsap and North Mason counties.

There are five employees in the coffee bar, including the “supervisor,” Darren Wheeler. Wheeler, who schedules the employees, has authority to grant time off, and interviewed and recommended for hire at least one employee, who was subsequently hired.³ The coffee bar is open from 6:00 a.m. to 9:00 p.m. six days a week, and 6:00 a.m. to 7:00 p.m. on Sundays. There are six employees in the deli department, including the supervisor, Lynn Vandlin, who has authority in her area similar to that exercised by Wheeler in his. The deli department is open from 7:00 a.m. to 9:00 p.m. in winter, and 7:00 a.m. to 10:00 p.m. in summer. Wheeler and Vandlin both report directly to the store manager.

Coffee bar employees do not perform any work in the deli department, nor do deli department employees perform any work in the coffee bar. Courtesy booth employees, who are unrepresented, have been trained to work in the coffee bar and substitute for regular coffee bar employees during breaks. There have been no transfers of employees between the coffee bar and the deli department within the store. One coffee bar employee, Candy Singleton, was formerly employed in the deli department in the Employer’s store in Poulsbo.

The cash register in the coffee bar is not set up to be used as a general check-out counter and there are no scales there for weighing of produce. However, coffee bar employees can ring up non-coffee-bar purchases for the sake of customer convenience. Usually such customers are also purchasing a coffee bar product. Coffee bar employees have occasionally been asked to do other work in the store. Singleton once spent about 10 or 15 minutes putting coupons on cereal boxes. She testified that she once saw Justin, another coffee bar employee, filling the ice machine with bags and blocks of ice, and on another occasion saw Justin taking groceries out for a customer. She has also seen Wheeler take groceries out for a customer on one occasion. None of these functions is associated with the deli department.

Petitioner contends that the issue herein is controlled by the Board’s unpublished Order in 19-UC-617, involving the same Employer and UFCW Local 44. In that case, the union sought to accrete “butcher block” employees to its unit of meat employees. In its Order denying review, the Board found that the Acting Regional Director’s community of interest analysis was unnecessary, inasmuch as the relevant collective bargaining agreement included “service counter employees” in the existing unit, and the butcher block employees at issue were admittedly service counter employees. Petitioner here takes the Board’s Order to mean that the only determination that need be made herein is whether the coffee bar employees are Snack Bar, Take-Out, and Deli Department employees, and, if they are, then they are automatically included in the existing unit. The Employer argues that the instant matter is distinguishable from the earlier case because there the agreement specifically covered “service counter” employees, while here the Addendum does not specifically cover coffee bar employees, but merely covers the employees in a single specific department, of which the coffee bar employees at issue are not a part.

There is much to be said for the Employer’s position. It appears that the contract in the earlier case specifically listed the job classifications included in the meat unit, including a classification for service counter. Further, in the earlier case, the parties agreed that the butcher block employees at issue were in the service counter classification. Here, there is no convenient list of generic classifications included in the Snack Bar, Take-out, and Deli Department, and the record establishes that within the Employer’s organization the coffee bar is a separate department from the deli department. Thus, it cannot

³ The record does not clearly establish whether Wheeler interviewed the candidate(s) alone or in the company of higher authority. However, it is clear that the store manager, who made the final decision to hire, did not interview the candidate(s).

be said that the contract on its face covers the coffee bar employees, as was the case in the prior matter.⁴ On the record, the Employer stated its willingness to recognize Petitioner as the bargaining representative of the coffee bar employees in the deli unit on the basis of a card check, or its agreement that if the Board finds the coffee bar employees to be an accretion, that the deli department unit is the unit to which they should be accreted, rather than some other unit in the Employer's store. Contrary to Petitioner, I do not take such willingness on the part of the Employer to be a concession that the coffee bar employees are in a classification *already* covered by the collective bargaining agreement.

The Board has long followed a restrictive policy in finding accretions to existing units *because it is reluctant to deprive employees of their right to determine their own collective bargaining representative*. *Melbet Jewelry Co.*, 180 NLRB 107, (1969); *Gitano Group, Inc.*, 308 NLRB 1172 (1992). The Board will find a valid accretion "only when the additional employees have little or no separate group identity...and when the additional employees share an overwhelming community of interest with the pre-existing unit to which they are accreted." *Safeway Stores, Inc.*, 256 NLRB 918 (1981); *Gitano Group*, *supra*. In looking at whether a group of employees sought as an accretion share an "overwhelming" community of interest with unit employees, the Board emphasizes the factors of common supervision and interchange. *Towne Ford Sales*, 270 NLRB 311 (1984), *affd. sub nom. Machinists Local 1414 v. NLRB*, 759 F.2d 1477 (9th Cir. 1985); *Passavant Retirement and Health Center*, 313 NLRB 1216 (1994).

On brief, Petitioner contends that Wheeler is not a statutory supervisor, and points out that he has no more supervisory authority than does the produce department manager who is a grocery bargaining unit member. The fact that the produce manager is a bargaining unit member does not, however, establish that the produce manager is not a statutory supervisor, or that any other departmental supervisor in the store lacks statutory supervisory authority.⁵

Section 2(11) of the Act defines a "supervisor" as:

. . .[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Wheeler has authority to schedule employees, but he must have the approval of the store manager to increase their hours. There is no evidence that Wheeler has ever sought to increase the hours of any coffee bar employees. Wheeler has authority to grant time off, but there are no specific examples in the record. Wheeler interviewed at least one candidate for hire, and that person was hired to work in the coffee bar, but the record does not clearly establish that the person was hired solely on the basis of Wheeler's recommendation. The record otherwise establishes that final authority in all decisions regarding hiring, firing, and disciplining employees rests with the store manager. In these circumstances, the record is insufficient to establish that Wheeler is a statutory supervisor. The better to establish same rests on the party claiming the evidence of supervisory status – here, the Employer. Inasmuch as an

⁴ In this regard, I note that the coffee bar employees in the QFC store in Oyster Bay, covered by the same contract as involved here, are paid according to the bakery addendum to the contract, rather than the snack bar, take-out food, salad bar, and deli department addendum.

⁵ In fact, it is not at all uncommon for parties to place statutory supervisors in a unit.

Employer witness testified that Vandlin, in the deli department, has the same level of authority as does Wheeler, the record is likewise insufficient to establish that Vandlin is a statutory supervisor. Further, there is no record evidence to contradict Petitioner's assertion that all employees in the entire store share common immediate supervision by the store manager.⁶

While the record herein demonstrates that the coffee bar and the deli department employees share common "immediate" supervision, the significance of this factor as an indicator of "overwhelming" community of interest is diluted here, where there are other employees in the store in separate bargaining units and also other employees who are unrepresented, all working under the same "immediate" supervision. With respect to interchange, the record reflects that coffee bar employees and deli employees never substitute for each other. The only employees who substitute for coffee bar employees are unrepresented courtesy booth employees. The only non-coffee bar work performed by coffee bar employees consists of tasks normally performed by non-deli employees, including carrying out groceries for customers, stocking the ice machine, and attaching coupons to cereal boxes. Thus, neither of the key factors of common supervision and interchange supports a finding of accretion.

Likewise, other community of interest factors commonly considered do not support such a finding. Coffee bar employees and deli employees do not work side-by-side performing the same work; they are separated by about 100 feet of aisles, and they have little if any on-the-job contact. Their work is not functionally integrated. The products they are handling and selling are distinctly different. Although they have a similar level of skills, the tasks they perform are different and they use different equipment. In addition, prior to the opening of the coffee bar, the self-serve coffee was prepared by bakery employees, not by deli employees. Relief work for coffee bar employees is performed by unrepresented employees.

Safeway Stores, supra, and other cases, require that an accretion can be found "only when the additional employees have little or no separate group identity." Here, the coffee bar employees have more than a "little" separate group identity: they work in a separate area of the store; they never work side-by-side or intermingled with deli department employees; they have few, if any, on-the-job contacts with deli department employees; they perform different tasks using different equipment and sell different products.

In this regard, I reject Petitioner's argument on brief that "employee integration and employee interchange are not relevant to this analysis," and that produce workers in a grocery store, who have little interaction and interchange with grocery checkers in the same bargaining unit, "share an overwhelming community of interest" with those grocery checkers. This is pure argument, unsupported by the record, but an invalid one in any event. The issue is not about the community of interest among employees already in the established unit. That community of interest may be "overwhelming," it may consist simply of the assumed community of interest present in any unit, or the unit may be no more than an *ad hoc*, fragmentation created by the parties, premised on no more than the competing tradeoffs of the moment.

The issue is whether a *new* group of employees stands sufficiently separate that they should have the same rights of self-determination almost all employees have, or whether they are so hopelessly intertwined with the existing unit that it would be close to impossible to distinguish them as a separate voting group, and their rights to vote are forfeited by circumstance. The issue is *not* whether a combined unit for deli and coffee could be an appropriate unit, or what the unit would be if the store were being

⁶ It would be quite unusual for an employee complement the size at the Store to all report directly to one supervisor, but the record does not show otherwise.

organized for the first time. The issue is whether the new group *must* be included, or whether they are sufficiently distinct to warrant an election.

The coffee bar is a separate administrative unit. I note that there is no contention here that the coffee bar employees are a separate appropriate unit. In finding that the coffee bar employees have a separate group identity, it is unnecessary for me to make an affirmative finding that they could constitute a separate appropriate unit. *Machinists Local 1414 v. NLRB*, supra. It is sufficient to find, as I do here, that they have a separate group identity; they must be organized, not accreted.⁷

Therefore, based on the entire record, I conclude that the coffee bar employees are not an accretion to the deli unit, and I shall dismiss the petition.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by July 6, 1999.

DATED at Seattle, Washington, this 22nd day of June, 1999.

/s/ PAUL EGGERT

Paul Eggert, Regional Director
National Labor Relations Board, Region 19
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⁷ I intimate no determination herein as to what the appropriate voting group might be if a union sought to organize the employees, either separately or pursuant to a *Globe* election.